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Supreme Court, U.S.
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No. 061579

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In The
Supreme Court of the United States

Thomas Roy Henderson,
Petitioner,

v.

Gene Johnson, Director,
Virginia Department of Corrections,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR THE COURT

A.

DOES A MODIFICATION IN THE COURT-ACCEPTED KNOCK AND TALK PROCEDURE BY POLICE VIOLATE THE FOURTH AMENDMENT WHEN AUTHORITIES PRESTAGE THE APPEARANCE OF A RAID UPON A HOME?

B.

IS COUNSEL INEFFECTIVE FOR FAILING TO BRING THE UNCONSTITUTIONALITY OF THIS MODIFICATION BEFORE THE COURT WHEN CLIENT ASKS IT BE DONE?

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I. OPINIONS BELOW

The Fourth Circuit's unpublished opinion, Thomas Roy Henderson v. Gene Johnson, No. 66-6678, is on pages 1-3 of the Appendix A.

II. JURISDICTION

The Fourth Circuit entered its judgment in this case on October 19, 2006, No. 66-6678. In compliance with Supreme Court Rule 13 and 13.5, this petition has been filed within ninety days, plus sixty days granted extension, of the Fourth Circuit's judgment. Under 28 U.S.C. § 1254, the Supreme Court has jurisdiction to review the Fourth Circuit's judgment. (Order granting 60-day extension at Appendix B).

III. CONSTITUTIONAL AMENDMENTS INVOLVED IN THIS CASE

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be seized. U.S. Constitution, Amendment IV.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, **and to have the Assistance of Counsel for his defence.** U.S. Constitution, Amendment VI.

IV. STATEMENT OF THE CASE

A. Procedural Background

On January 9, 2002, Mr. Thomas Roy Henderson, petitioner, was charged in the City of Portsmouth, Virginia

with the offenses of possession of cocaine (Va. Code § 18.2-248) and marijuana (Va. Code § 18.2-248.1) both with the intent to distribute, and one charge of possessing a firearm while in possession of drugs. (Va. Code § 18.2-308.4)

Petitioner ultimately entered a plea of guilty to the possession of cocaine and the firearm offense. The possession of marijuana charge was dismissed in lieu of the plea of guilty on the other two charges.

Petitioner had contested the search consent originally in a pretrial suppression hearing. At the April 15, 2002 hearing, two officers of the Portsmouth City Police Department both testified that following what was termed a "knock and talk" encounter with Petitioner at his residence, his consent was freely given for police to conduct a warrantless search. Petitioner objected. Henderson's desired position on the issue was that the police instead employed a ruse to trick him into giving consent to search his home. This ruse, as Henderson saw and experienced it, violated his right under the Fourth Amendment to be free from warrantless searches and seizures.

Petitioner's attorney, however, refused to argue the specific issue of the illegal use of the knock-and-talk; instead, counsel simply addressed the broader issue of whether the search consent was freely given. Counsel for the defense did not call for Henderson's testimony at this hearing, despite his presence in the courtroom and his willingness to testify.

After hearing the matter, the court ruled that the consent was voluntary and admitted the fruits of the search into evidence.

Upon advice of counsel, no direct appeal was made in this case.

After Henderson's arrival into the general prison population, he discovered through contact with other inmates that he would have had the option of addressing in direct appeal the court's ruling on the search issue. This news triggered his filing in error of a petition in federal court under 28 U.S.C. § 2254. (2:04cv311, E.D.Va.). The filing was premature; Henderson had yet to allow the Virginia courts to address the claims in this petition. The federal court ruled the petition dismissed without prejudice on June 7, 2004 with Henderson allowed the opportunity to file his state post-conviction action first.

State petition for habeas corpus was filed with the Portsmouth Circuit Court claiming, inter alia, the illegal search matter in this petition and also ineffective assistance of counsel, also in this petition.

Following a customary procedure in the Commonwealth's response to the pleadings, the State filed a motion to dismiss Henderson's claims and his petition. The central argument in support of this position, which was later adopted by the court, was that Henderson had procedurally defaulted the illegal search claim by not raising the issue on direct appeal (the court citing Slayton v. Parrigan, 215 Va. 27, 29-30 (1974), and Brooks v. Peyton, 210 Va. 318, 321-322 (1969)).

Petitioner raised the same issues on appeal of the habeas corpus dismissal with the Virginia Supreme Court; the Court rejected the appeal on June 6, 2005. (Record No. 042955).

The matter was then resubmitted to the United States District Court, Norfolk, Virginia where the claims were dismissed. (2:05cv639)(Final Order at Appendix A). Appeal of this decision was made to the U.S. Court of Appeals for the Fourth Circuit. (Record No. 06-6678)(Unpublished Opinion at Appendix B).

This Petition for Writ of Certiorari follows.

C. The Case

This case argues that the actions of the Portsmouth Police Department were unconstitutional in violation of Mr. Henderson's protections from unwarranted searches and seizures.

As a result of a "tip" from an unidentified source, police officers initiated what was referred to as a "knock and talk" at the home of Petitioner at 8:40 the evening of January 9, 2002. No probable cause existed and no warrant was actually issued for a search.

To accomplish this, police officers walked up to the front of Mr. Henderson's home and knocked on the door. When Henderson answered, the officer accused Mr.

Henderson of being a drug dealer. In preparation for this seemingly non-intrusive approach, the officers staged their presence first. Two patrol cars were strategically placed on the street out in front of Henderson's residence in the evening, service lights on when no immediacy called for lights. One car was placed directly in front of the house, another a few houses down near the intersection. Both vehicles were plainly visible to Henderson as he opened the door. Another tactic employed by police was a rolled up piece of paper, a fake warrant, held in the hand of the officer, inferring that a search was approved and imminent.

Henderson answered the door to police. What he experienced, what he was led to believe by police, was that a warrant for a search was already issued. This presentation by police officers overstepped the line between a casual knock and talk, as one would perceive something named so benignly, into an unconstitutional intrusion into the home of Mr. Henderson. By staging the scene as one where police are armed with a warrant, the will of the subject is overwhelmed and his ability to resist police requests is disabled.

This Court has had a history of willingness to expand the powers of the police to intrude upon the lives of the citizenry, all in the name of curbing crime. Yet, this power is still not enough for police, who now, with a free ticket to rewrite the guidelines, feel at ease overstepping those few remaining limitations on power place on them by this Court. This case seeks action from this Court. It seeks a warning from this Court to police that they are not free to overstep these limits and abuse the rights Americans retain under the Constitution.

This case also seeks similar guidance from this Court to counsel for the defense, who are obligated to place their cases squarely within the crucible of adversarial testing. All too often courts allow attorneys to provide substandard service to their clients. In this case, as in a great many others, attorneys have felt free to limit their zealous defense of clients for fear of offending the courts, or prosecutors. This laissez-faire attitude toward defendant's complaints of counsel ineffectiveness has resulted in a failed system where the innocent are convicted far too often.

This petition seeks justice from this Court and leadership in the defense of the Constitution and the rights of the citizens of this Country.

V. Argument

A. The Fourth Amendment Should Have Protected This Petitioner

The Fourth Amendment to the United States Constitution declares that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures and seizures, shall not be violated." U.S. Const. Amend. IV. In order to gain access into the sanctity of someone's' home, a warrant must first

issue: this warrant may not be issue except upon probable cause. Id.

The pretense in this case is that this "knock and talk" procedure, as applied by the Portsmouth Police Department is unintrusive, that it is what it is called, a simple and plain knock on a door with a conversation subsequently started with the resident. The mental image generated from this term is that of a benign encounter with police where the officer casually engages the resident in conversation. What is not generated from this simple term is a raid by police. The term knock and talk does not generate the image of a police raid, complete with patrol car service lights blazing in the night and police banging on the front door with a fake warrant in hand.

Authorities employing this style of police encounter no doubt consult many different sources when developing a successful strategy to gain entry to a home absent probable cause. It is not hard to imagine that they are also trained to some degree on methods of using these tactics. Modifying these otherwise innocuous exceptions to the Fourth Amendment can make it easy for police to employ these tactics with greater success, often this is easier than gaining the requisite support for a warrant. This experience, coupled with adequate training, has allowed police to tip the balance unfairly in favor of success by imitating not a consensual and casual police encounter as envisioned by the term "knock and talk", but instead a police raid.

In such circumstances, with sufficient police intimidation, they no doubt find that they can employ the power of the uniform and their equipment to overcome the

will of the intended target. All the while staying technically within the boundaries of the law. [1]

It has remained the position of the Commonwealth that Henderson was not "seized" at the time he "willingly" consented to the search of his home. According to police testimony, the encounter between police and Henderson was calm and friendly, and no show of authority influenced the meeting at all. It has remained the position of Petitioner that the "consent" was obtained through a coercive ruse constructed by police in their implementation of a "knock and talk" encounter. A ruse, which displayed an overwhelming, show of authority and implied force. Under the Fourth Amendment, every search and seizure by police must be reasonable. Any seizure must be supported by probable cause and executed pursuant to a warrant.

Note 1 As understood by this petitioner, there exists no prohibition on anyone, absent trespass conditions, from openly and peaceably walking up to a man's steps at daytime and knocking on the door to casually ask questions See, e.g., Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964). Petitioner is also well aware that the traditional and talk" procedure, absent more, has been determined by the courts to be just an encounter and does not, in and of itself, constitute a seizure. See, United States v. Velazco-Durazo, 372 F.Supp.2d 520, 525 (D. Ariz. 2005)("[A] knock and talk is a consensual encounter. Consensual encounters between police officers and citizens are not seizures.), and see Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)("Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or a show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred.").

See, Katz v. United States, 389 U.S. 347, 357 (1967)(4th Amendment presupposes warrant requirement for searches and seizures).

In this case the police knocked on Henderson's door without either probable cause or a warrant, but they made it look as though the warrant was "in hand" by holding the folded paper in hand during the encounter. The purpose of the paper was to influence Henderson into believing his being handcuffed and carted off was imminent and search of his home, therefore, inevitable. In this manner the police would gain the advantage of allowing the suspect to believe he was under arrest or something very similar to it, while simultaneously relieving the officers of the burden of having to establish probable cause or gain a search or arrest warrant.

Brief warrantless seizures may take place under certain conditions. See, Terry v. Ohio, 392 U.S. 1, 22-24, 26 (1968). But the circumstances that would allow such brief stops are "narrowly drawn". Id. at 26. In what is known as a Terry stop, police may temporarily seize a person if the police officer has a reasonable suspicion that the suspect is engaged in criminal activity. The seizure must be brief, and its purpose limited to a pat down to search for weapons that may pose an immediate risk to the safety of the officer. Id. There was no immediate risk to the officers in the case, however. The information of criminal conduct by Henderson, according to police testimony, originated from an uncorroborated, anonymous source -- a "concerned citizen". There is no other corroboration of the veracity of this informant other than this brief description in the record; moreover, police had no reason to believe their safety was at risk to the degree to justify a "pat-down" of Henderson or

any of the occupants of his residence. A Terry stop defense by police to the illegal search would be a stretch, and they knew it.

The Supreme Court has held that a law enforcement officer is justified in relying upon information from an anonymous tipster in order to briefly detain a suspect for inquiry and investigation **only if** the anonymous information is "sufficiently corroborated" to provide some indicia of reliability. Alabama v. White, 496 U.S. 325, 331 (1990). The police had no such corroboration, or requisite indicia to detain Henderson for a Terry-like arrest, but if they could mold the circumstances to fit as though probable cause was established through a ruse on Mr. Henderson the Fourth Amendment could be effectively circumvented. This is what happened to this petitioner and it was the plan, and the intention, of the police to bring this about when they set a staged "knock and talk" at Henderson's residence.

Despite the claims of police and the Portsmouth Circuit Court that Henderson acted out of free will when he consented to the search of his home, Henderson was in fact "seized" for all intents and purposes when the police removed his free will to resist police requests, When police knocked on Henderson's front door with a paper in hand, leaving Henderson to think it was a warrant, they knew it would impact the suspect to remove free will to resist their requests. When the service lights were left on the marked squad cars that were strategically parked outside on the street, they knew this would add a show-of-force effect to their scare tactic. The accusing statement from police that a concerned citizen has reported that he has been selling drugs out of his home -- this was not a question -- it was a raid on

Henderson's home and an attack on him, and it was all designed to create in the mind of Mr. Henderson the idea that the police had a warrant and they were making a raid on him and his residence,

A seizure of a person occurs when, "in view of all of the circumstances surrounding the incident," a person reasonably believes he is not "free to leave", or disengage from, an encounter with police authorities, Michigan v. Chesternut, 486 U.S. 567, 573 (1988). One test for whether or not a suspect feels free to disengage from a consensual encounter with police is whether the techniques used by police overcame a detainee's free will. See, United States v. Mendenhall, 446 U.S. 544, 554 (1980). This Court has noted several factors, which tend to indicate police overbearance:

(1) Threatening presence of officers (i.e., size difference or several officers),
(2) Display of weapons,
(3) Physical touching, or
(4) Language or tone implying compliance will be compelled. Id. at 554-55;

See also, United States v. Watson, 423 U.S. 411, 424 (1976) (conditions under which search took place should also be considered, such as characteristics of the accused and police conduct, including the duration, location, and time of the encounter); United States v. Analla, 975 F.2d 119, 125 (4th Cir. 1992), cert, denied, 507 U.S. 1033 (1993). Also relevant is "[w]ether the accused knew that he possessed the right to refuse consent". See, Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973).

At no time was Henderson told he could refuse a nighttime search of his home and, further, he was not given his Miranda warnings until the following day. Miranda v. Arizona, 384 U.S. 436 (1966). A seizure takes place when any of these factors outweighs the suspect's capacity to resist. See, Bumper v. North Carolina, 391 U.S. 543, 550 (1968)(holding that consent was invalid when given after police officers claimed authority to search home under warrant); United States v. Lattimore, 87 F.3d 647, 652 (4th Cir. 1996)(en banc)(stating that police officer's assertion that he could "call a drug dog" to search suspect's car if suspect refused consent "would raise serious questions concerning the voluntariness of his consent"); and see, Florida v. Bostic, 501 U.S. 429, 439 (1991). ("Court... not empowered to suspend constitutional guarantees so that the Government may more effectively wage a 'war on drugs'").

Here we have a threatening presence in the form of two uniformed police officers, two squad cars parked in strategically arranged positions outside — lights left on, with one of the officers holding what appears to be a warrant. This is a show of force. The language the officer used in accusing Henderson of being a drug dealer, this too influenced his exercise of free will to assert the implication that compliance with the officer's requests would be compelled. Further, police had Henderson cornered in his own home in the evening hours. This adds even more weight to the argument that Henderson was not free "to ignore the police presence and go about his business". Florida v. Bostic, 501 U.S. 429, 437 (1991) (quoting Michigan v. Chesternut, 486 U.S. 567, 569 (1988). Based on the record in this case, including the flimsy "concerned citizen" report which was uncorroborated and anonymous, it

is difficult to conceive of a court determining that through all of the orchestrated staging by the police to create the ruse of imminent arrest of Henderson, that this "consent" could have been anything but coerced.

B. Counsel was Ineffective

The Sixth Amendment to the United States Constitution guarantees that a criminally accused "shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This right applies to all cases where a felony is charged. Gideon v. Wainwright, 372 U.S. 335, 342 (1963)(6th Amendment right to counsel applies to state through the 14th Amendment). This right attaches at every critical stage in the proceedings, including "preliminary hearing, indictment, information, or arraignment". Kirby v. Illinois, 406 U.S. 682, 689 (1972). This Court has held that for counsel to function as counsel under the Sixth Amendment, he/she must also be "effective". McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (6th Amendment right to counsel is right to effective assistance of counsel).

This Court also established a two-prong test to evaluate claims of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687 (1984). To obtain reversal of a conviction, the defendant must prove: (1) that counsel's performance fell below an objective standard of reasonableness and (2) that counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceeding. Id. at 687-688.

Counsel retains the advantage of being presumed to have made the right decisions in his defense of a client. Id. at 689. And any restrictions placed upon counsel by the defendant's lack of cooperation, or concealment of information, may weigh against any claim of counsel ineffectiveness. See, Rose v. Lee, 252 F.3d 676, 692 (4th Cir. 2001)(counsel's failure to present evidence of defendant's sexual disorder during penalty phase of trial was not defective assistance because defendant had instructed counsel not to raise the matter at hearing); Mathews v. Evatt, 105 F.3d 907, 919 (4th Cir. 1997)(counsel's failure to discover defendant's brain damage not ineffective because defendant neglected to supply information to counsel); Oken v. Corcoran, 220 F.3d 259, 269 (4th Cir. 2000). There are a few instances, however, when counsel's ineffectiveness is presumed, such as when a claim is based upon counsel's unexcused failure to bring direct appeal of a criminal conviction when the client directs his counsel to do so. Strickland, supra, 466 U.S. at 692.

In this case counsel's failures deprived Henderson of a fair proceeding on the suppression matter. Counsel also failed to defend his client's interests when he failed to argue, at the suppression hearing, the matter of a Fifth Amendment violation of his client's due process rights. Miranda v. Arizona, 384 U.S. 478-479 (1966)(prior to the initiation of formal proceedings, an individual has a Fifth Amendment right to counsel during any custodial interrogation); and see, Stansbury v. California, 511 U.S. 318, 322 (1994)(person taken into custody by law enforcement, or "otherwise deprived of his action in any significant way must first" receive Miranda warnings).

By this, Henderson alleges that counsel should have, but did not, address the matter of a Fifth Amendment violation at the suppression hearing, and any failure of counsel to do so was not derived from any strategic choice of the defense. Had counsel argued that (1) there was in fact a "custody" created by the police when they created an overt show of authority (argued ante), and (2) that in this case Miranda warnings should have been administered prior to the request for consent to search Henderson's home, the "outcome of the proceeding" would have been different. Williams v. Taylor, 529 U.S. 362, 391-93 (2000). This argument would have indeed established that a seizure did take place, and that any "consent" there from would have been shown to be coerced. Had counsel also called his client to the stand to testify, when the client would have provided strong evidence of the coercive effect of these overt displays of power by police, which created in the mind of Henderson his compulsion to cooperate with their requests, counsel would have been successful in gaining suppression of the evidence in this case. Henderson believes that counsel's performance was critically deficient in that counsel not only failed to raise important key issues during the suppression hearing that would have supported a motion to suppress the evidence, he also misadvised Henderson on his options following the court's denial of the suppression motion. This bad advice led Henderson to enter a hasty guilty plea when otherwise he would not have. Performance such as this constitutes ineffective assistance of counsel. (See, Appendix C, Affidavit of Thomas Roy Henderson).

Henderson was certainly willing and able to testify effectively to these actions of police and to give his side of

the event — counsel should have called him to the stand. Further, because the matter should be judged from the "totality of circumstance", the lawyer's obligation here, in zealous defense of his client's Constitutional rights, would have been to call Henderson to the stand to submit testimonial evidence of police orchestrated coercion. Without this evidence it is extremely difficult to conclude that anything but a negative outcome could result for the defendant. After all, the court was only given one side of the story. Counsel had the option, in fact the duty, to bring forth and present both sides to the court, not to simply allow his client to be faced with police accounts, or versions, of the facts spun to the advantage of the prosecution.

Should counsel have called Henderson to the stand? Should he have raised the Fifth Amendment issue and the collateral issues also? Petitioner submits that in order for counsel to have acted as "Counsel" under the Sixth Amendment he must have both called the willing defendant to testify and raised the constitutional issues in his defense. In Strickland v. Washington, 466 U.S. 668, 687-689, this Court determined that the performance prong of the two-part test requires a showing that counsel's actions or omissions were not the result of reasonable professional judgment, and that counsel was not functioning within the range of competence expected of attorneys in criminal cases. **Id. 687, 690.** Petitioner submits here that counsel's failure to argue the Fifth Amendment Constitutional matter at this hearing resulted in what the Supreme Court has determined to be a failure to meet the performance prong of the Strickland two-part test.

Taking into consideration all fair advantage to counsel in that the choice not to call Henderson was part of some trial strategy. What would this "strategy" be? It was not played out elsewhere in this case. Within days of the court's rejection of the suppression motion, counsel pressed Henderson to take a deal and enter a plea of guilty. There is no evidence that counsel's choice to engage the prosecution in a suppression hearing empty-handed is part of any trial strategy. In fact, considering that Henderson was there to testify, and the defense's position on this matter was in part the consent-to-search issue, it is highly implausible that neglecting to call to the witness stand, the only witness counsel had, would be part of any strategy at all.

This Court has held, for example, that duty of counsel to investigate his/her client's case derives from counsel's basic function, which is "'to make the adversarial testing process work in the particular case.'" Kimmelman v. Morrison, 477 U.S. 365, 384 (1986)(quoting Strickland, 466 U.S. at 690). This, the Court reasoned, is because the "testing process will generally not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies". Id. This Court stressed "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, supra, 466 U.S. at 691. Similarly to a situation where a lawyer fails to investigate potential witnesses and, as a result, fails to call the potentially exculpable witness to the stand, a lawyer who fails to call his only defense witness, and bases his defense of his position on the experiences of that only witness, cannot be said to have considered his options well enough to have crossed the threshold of reasonably competent

performance, nor has he exhibited evidence of any sort of a strategy. See, e.g., United States ex rel. Cosey v. Wolff, 727 F.2d 656, 658 n.3 (7th Cir. 1984) ("Having independent witnesses corroborate a defendant's story may be essential"). Under circumstances as these, petitioner asks this court to weigh heavily the lack of any evidence of a strategy to counsel's failure to call his only witness to the stand at this hearing.

Regarding the issue of counsel's advice to enter a plea of guilty. Henderson was under the understanding after the adverse outcome of the suppression hearing that there was no option left in that case on the matter of the legality of the search. According to counsel, should the cocaine and firearms be admitted into evidence a trial would not be advised. This advice, however, omits the fact that Henderson could appeal the matter of the search after trial should he lose. True, Henderson could very well have gone to trial, and lost. But the matter of the illegal search, which would ultimately lead to a suppression of the evidence should the appeals court agree with him on the matter of suppression, would have changed the entire outcome for Henderson. If he could appeal the search issue after a guilty verdict at trial, and win, the conviction would be overturned and he would, ultimately, have won his original claim that the search consent was coerced. Justice in this case would be slower in coming, but it would have ultimately prevailed.

Counsel presented the case differently to Henderson in that in his opinion, an appeal of the search would not be available, at all, following an adverse outcome of the suppression hearing. At trial, a conviction would be inevitable, according to counsel. Further, counsel also

advised that with the guilty plea no appeal at all would be allowed on any issue or any claim. Counsel was wrong. Guilty pleas, for example, do not waive every non-jurisdictional error. See, Menna v. New York, 423 U.S. 61, 63 n.2 (1975)(per curiam)("Neither Tollet nor our earlier cases on which it relied, e.g., Brady and McMann, stand for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations.") (Citations omitted).

According to this Court in Menna v. New York, supra, it is not the case where a defendant automatically waives all claims after entry of a guilty plea. Yes, an appeal of the guilty verdict itself would not be allowed because it is presumed to have been entered intelligently and voluntarily. See, Park v. Raley, 506 U.S. 20, 29 (1992). But this would be limited to the issue of guilt alone assuming that the plea was entered voluntarily, knowingly, and intelligently. If the plea was bought with misinformation, however, the matter changes. Under this circumstance the plea is questioned as not entered knowingly, or intelligently. With counsel feeding his client the wrong information, a defendant's options cannot be said to have been drawn from enough accurate information to be based upon a voluntary and intelligent waiver of the defendant's constitutional rights to jury, to the right to confront the accusers, or the enjoyment of the privilege against self-incrimination. Moreover, the defendant would have, upon the entry of a guilty plea, the right to contest the illegal search. See, e.g., United States v. Arango, 966 F.2d 64, 66 (2nd Cir. 1992)(guilty plea precludes defendant from challenging legality of search and seizure on appeal); United v. Cain, 155 F.3d 840, 842 (7th

Cir. 1998)(same); United States v. Jennings, 12 F.3d 836, 839 (8th Cir. 1994)(same).

Here, counsel implied that a de facto "waiver" of the suppression issue was created when the court ruled against his motion to suppress the evidence. This in fact is legally incorrect; the "waiver" is actually made upon entry of the entry of an intelligent, knowing, and voluntary plea of guilty. Since Henderson believed that the matter of the suppression was settled law, and believing he had no other recourse on that matter, his judgment was of course flawed on the issue of whether or not to enter a plea of guilty or go to trial. Defendant Henderson was left to make a decision to plead guilty thinking that the suppression claim was already "waived" when in fact it was not. Under this set of circumstances it cannot be said that the plea was entered "knowingly", or "intelligently" because the defendant did not have all of the facts that should have been available to him through his attorney. See, U.S. v. Hellbusch, 147 F.3d 782, 783-84 (8th Cir. 1998)(guilty plea did not waive right to collateral review of whether plea was unintelligent).

In this case Henderson alleges that the plea was not entered intelligently, or voluntarily and the circumstances of this case bear that out. Had he had all the accurate facts ahead of time, he would have opted to go to trial and appeal the outcome of both the verdict and the court's entry on the suppression motion. He was prevented from making a reasonable, well-informed decision on the choice to enter a plea because of counsel error.

Counsel's performance in this case fell below the objective standard of reasonable conduct expected of

competent attorneys. Savino v. Murray, 82 F.3d 593, 599 (4th Cir.1996)(dictum)(competency measured according to what objectively reasonable attorney would have done under circumstances existing at time of representation). An attorney has a responsibility to his client to be knowledgeable in the law and to know what options a client may have in the criminal defense arsenal. Further, Henderson would not have entered a plea of guilty in this case, but for the bad advice of his attorney advising him of the finality of the circuit court's decision on the suppression motion. Hill v. Lockhart, 474 U.S. 52, 56, 59 (1985)(guilty plea voluntary and intelligent when defendant received competent advice from counsel).

On the matter of appeal, Henderson would have taken to the Court of Appeals and beyond any adverse outcome in these criminal proceedings. But for the bad advice of counsel, Henderson would have elected to go to trial. But for the misdirection by counsel, Henderson would have pursued the suppression matter to a higher court. Should Henderson have lost at trial, he would have pursued the matter of the conviction and the search to the higher courts and would have, in his estimation, been successful in gaining suppression of the evidence in this case. Henderson believes that counsel's performance was critically deficient in that counsel not only failed to raise important key issues during the suppression hearing that would have supported a motion to suppress the evidence, he also misadvised Henderson on his options following the court's denial of the suppression motion. This bad advice led Henderson to enter a hasty guilty plea when otherwise he would not have. Performance such as this constitutes ineffective assistance of counsel.

This Court is also asked to consider the abuse of the knock and talk in this case in the context of the Fifth Amendment's protections against self-incrimination. "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" Bram v. United States, 168 U.S. 532, 542 (1897).

As applied in this case, the police coerced Mr. Henderson's involuntary permission to search his home implicating Henderson's right against self-incrimination. "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." Culombe v. Connecticut, 367 U.S. 568, 602 (1961). Moreover, this Court has acknowledged further that confessions can be illegally induced by the employ of other illegal tactics, such as unlawful search and seizure. Fahy v. Connecticut, 375 U.S 85 (1963).

C. Procedural Bar Issues

It is understood that a federal court may not grant habeas corpus relief to a state prisoner who has not exhausted available state court remedies. See, 28 U.S.C. § 2254(b)(1)(A). A state prisoner is deemed to have satisfied this exhaustion requirement when he has properly pursued his claims throughout the entire appellate process of the state. See, Boston Mun. Ct. v. Lydon, 466 U.S. 294, 302-03 (1984)(exhaustion requirement satisfied when claim is presented to state supreme court); Fields v. Bagley, 275 F.3d 478, 482 (6th Cir. 2001)(per curiam)(exhaustion requirement satisfied when claim brought to highest state court); Mathews v. Evatt, 105 F.3d 907, 912 (4th Cir. 1997)(exhaustion requirement not satisfied until prisoner presents claim to highest state court)(citing Mallory v. Smith, 27 F.3d 991, 995 (4th Cir. 1994)). The purpose of requiring a state prisoner to present the substance of his claim to the state courts is to allow a fair "opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." Picard v. Conner, 404 U.S. 270, 276-77 (1971)("state prisoner [must] present the state courts with the same claim he urges upon the federal courts."); Anderson v. Harless, 459 U.S. 4, 6 (1982)("[T]he habeas petitioner must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim"); and see, Hill v. Lockhart, 28 F.3d 832, 834-35 (8th Cir. 1984) (exhaustion requirement satisfied even though claim not precisely articulated to state court, but instead mentioned in paragraph focusing on different, related claim). The state

court need not specifically address the claim in a written opinion to satisfy this requirement. See, Smith v. Digmon, 434 U.S. 332, 333-34 (1978)(per curiam). So long as the procedural default rests upon "adequate and independent state grounds", the petitioner is generally barred from obtaining federal review of the defaulted claim. Coleman v. Thompson, 501 U.S. 722, 729-31 (1991). Federal habeas review of a an otherwise barred-by-default claim may be found if the petitioner can demonstrate both cause for the procedural default and actual prejudice as a result of a violation of federal law. See, Coleman v. Thompson, supra, 501 U.S. at 750; and see, Murray v. Carrier, 477 U.S. 478, 488, 492 (1986)(rule applied, and including ineffective assistance of counsel as a possible "cause"). Habeas court at the federal level will presume that no adequate and independent state grounds exist when the state court's decision "fairly appears to rest primarily on federal law or to be interwoven with federal law" and "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." Coleman v. Thompson, supra, 501 U.S. 722, 732-35 and 733-35 respectively.

In this case the petitioner submits that all claims raised in this federal habeas corpus were "fairly presented" to the state circuit and supreme courts. Because it has been necessary to expand upon the claims originally brought in the state petition for habeas corpus, for the purpose of clarity and also to assert a supporting legal basis for these claims generally, Henderson has included arguments of substantive violations that underpin the overall claims made in his petition. See, Pope v. Netherland, 113 F.3d 1364, 1368 (4th Cir. 1997)(exhaustion requirement satisfied because

petitioner's state court challenge to sufficiency of evidence held necessarily due process challenge to conviction).

To excuse any preclusion of federal review in this case that may rest on the basis of a procedural default at the state level, petitioner relies upon both ineffective assistance of counsel as cause for any default and the fact that were it not for these errors of counsel, a prejudice of conviction and sentence would not have resulted (i.e. the effective suppression of evidence in this case necessary to support a guilty verdict would have been accomplished). Further, petitioner asserts that due to the substantive nature of the constitutional violations alleged by him, any failure to gain review of these claims would result in a grave miscarriage of justice. Coleman v. Thompson, supra, 501 U.S at 750.

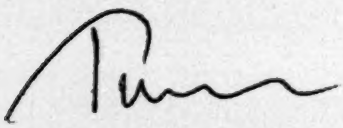
D. FINAL STATEMENT

In a final statement Mr. Henderson requests this Court's review of the matters raised herein. It is his sincere belief that the issues are of national importance. Particularly in these current times when the continued integrity of our liberties is of great concern to the citizens of this Land. The time is now to correct these ill-conceived measures of the past and to reset a new horizon that Americans can trust to guide them through these darkest of times.

VI. CONCLUSION

For the foregoing reasons, Henderson respectfully requests that the Court grant this petition for writ of certiorari.

Respectfully submitted,



Thomas Roy Henderson, Pro Se Petitioner
#314611 Deerfield Correctional Center
21360 Deerfield Drive
Capron, Virginia 23829

(2)

No. 06-1579

In The
Supreme Court of the United States

Thomas Roy Henderson,
Petitioner,
v.

Gene Johnson, Director,
Virginia Department of Corrections,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

APPENDIX

Thomas Roy Henderson, Pro Se
#314611
Deerfield Correctional Center
21360 Deerfield Drive
Capron, Virginia 23829

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 22nd day of June, 2005

Thomas Henderson,

against

Record No. 042955
Circuit Court No. L04-1251

Gene M. Johnson, Director,

From the Circuit Court of the City of Portsmouth

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, Court- refuses the petition for appeal.

A Copy,

TESTE:

Patricia L. Harrington, Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED MARCH 1, 2006

THOMAS ROY HENDERSON,
Petitioner,

2:05CV639

v.

Virginia Department of Corrections,
Respondent.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter was initiated by petition for writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to the undersigned United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia.

I. Statement of the Case

A. Background

On October 24, 2002, in the Circuit Court for the City of Portsmouth, Virginia, petitioner was convicted of possession with the intent to distribute cocaine and possession of a firearm while in possession of a controlled substance. Petitioner was sentenced to serve ten years imprisonment. Petitioner did not appeal the convictions to the Virginia Court of Appeals or to the Supreme Court of Virginia.

On June 25, 2004, petitioner filed a petition for writ of habeas corpus in the Portsmouth Circuit Court, but the petition was dismissed on September 29, 2004. Petitioner appealed to the Supreme Court of Virginia, which dismissed the appeal on June 22, 2005.

On October 27, 2005, petitioner filed a petition for writ of habeas corpus in federal court, and on November 25, 2005, respondent filed a motion to dismiss and Rule 5 answer. This matter is now ripe for consideration

B. Grounds Alleged

Petitioner alleges the following grounds:

1. Petitioner's Fourth, Fifth, Sixth, and Fourteenth Amendment rights were violated during the search of his home through to the suppression hearing;

2. Ineffective assistance of counsel because counsel:

a. failed to argue at the suppression hearing the violation of petitioner's Fifth Amendment right to establish that a seizure occurred and that any consent was coerced;

b. failed to call petitioner to testify;

c. failed to advise petitioner concerning "what exactly was appealable and when it could be done"; and

d. advised petitioner to plead guilty and petitioner did so because he was "under the understanding after the adverse outcome of the suppression hearing that there was no option left in that case on the matter of the legality of the search."

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Motion to Dismiss Standard

In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the complaint is construed in the light most favorable to the plaintiffs and their allegations are taken as true. See Brower v. County of Inyo, 489 U.S. 593, 598 (1989)(citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)); Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The complaint should not be dismissed unless it appears to a certainty that the plaintiff can prove no facts in support of his claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); GE Inv. Private Placement Partners II v. Parker, 247 F.3d 543, 548 (4th Cir.2001); Martin Marietta Corp. v. Int'l Telecomms. Satellite Org., 991 F.2d 94, 97 (4th Cir. 1993). The courts must construe the complaint liberally in favor of the plaintiffs, even if recovery appears remote and unlikely. In ruling on a 12(b)(6) motion, the court primarily considers the allegations in the complaint but may consider attached exhibits and documents incorporated by reference. See Simons v. Montgomery County Police Officers, 762 F.2d 30, 31 (4th Cir. 1985); Wolford v. Budd Co., 149 F.R.D. 127, 129-32 (W.D. Va. 1993).

B. Standard of Review for State Court Findings The federal statute regarding review of state court habeas corpus actions provides that:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court

shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(2000).

This standard, adopted by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L.No. 104-132, is consistent with the Fourth Circuit's interpretation of 28 U.S.C. § 2254(d) prior to the passage of the new law. In Fields v. Murray, 49 F.3d 1024 (4th Cir. 1995) , the court held that a review of a state court finding, which is entitled to a presumption of correctness, compels the habeas court to accord a high measure of deference to the state court. See id. at 1032-33 (citing Rushen v. Spain, 464 U.S. 114, 120 (1983); Sumner v. Mata, 455 U.S. 591, 598 (1982)). As stated in Marshall v. Lonberger, 459 U.S. 422 (1983), "[t]his deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair [] support' in the record." Id. at 432.

C. Petitioner's Claims are Exhausted and are Subject to Federal Review.

The exhaustion requirement dictates that a petitioner must first present his claims for relief to state courts before a petition for habeas corpus may be granted by the federal courts.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question - presented.

28 U.S.C. §§ 2254 (b) (c) (2000).

A claim raised in a federal petition for writ of habeas corpus must be the same claim as that presented in state proceedings. See Picard v. Connor, 404 U.S. 270, 275-76 (1971); Pitchess v. Davis, 421 U.S. 482, 487 (1975); Joseph v. Angelone, 184 F.3d 320, 325 (4th Cir. 1999); Beck v. Angelone, 113 F. Supp.2d 941, 960-61 (E.D. Va. 2000); see also Anderson v. Harless, 459 U.S. 4, 6 (1982); Duncan v. Henry, 513 U.S. 364, 365 (1995); Satcher v. Pruett, 126 F.3d

561, 573 (4th Cir. 1997). Respondent concedes, and the Court agrees, that for purposes of federal review, petitioner's claims are exhausted.

C. The Petition is Barred by the Statute of Limitations.

On April 24, 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA). With the passage, of the AEDPA, several modifications were made to habeas corpus law. Before the passage of the AEDPA, a prisoner could file a habeas corpus petition at any time. See Brown v. Angelone, 150 F.3d 370, 371 (4th Cir. 1998). However, the AEDPA created a statute of limitation for habeas corpus petitions. See 28 U.S.C. § 2244 (d)(1)(2000); Brown, 150 F. 3d at 375. The AEDPA provides that any person in custody pursuant to a state court judgment has a one-year period of limitation for the filing of a writ of habeas corpus. The period of limitation runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The time during which state post-conviction or other collateral review is pending is not counted toward this period of limitation. See id. § 2244(d)(2).

In this case, final judgment was entered against petitioner in the Circuit Court for the City of Portsmouth on October 24, 2002. Petitioner did not pursue a direct appeal of this conviction, therefore, his state conviction became final November 24, 2002. Accordingly, petitioner had one year from November 24, 2002, to file his federal habeas petition. 28 U.S.C. § 2244(d)(1)(A).

Petitioner is entitled to exclude the time during which "a properly filed application for state post-conviction or other collateral review ... is pending . . ." 28 U.S.C. § 2244(d)(2). However, petitioner did not file his state habeas petition until June 25, 2004, more than one year and six months after his state court judgment became final. Therefore, the petition is time barred and should be DISMISSED.

D. Equitable Tolling Language

Having found that petitioner's federal habeas petition is time barred, the Court must next determine whether to invoke the doctrine of equitable tolling to excuse petitioner for not filing within the limitation period.

In applying the AEDPA, the Fourth Circuit and elsewhere have concluded that the time limitation codified in § 2244(d) is analogous to a statute of limitations rather than a jurisdictional bar. See Harris v. Hutchinson, 209 F.3d 325, 328-29 (4th Cir. 2000); Brown v. Angelone, 150 F.3d 370, 317-72 (4th Cir. 1998). Thus, under the appropriate circumstances, the judicial doctrine of equitable tolling may be invoked by petitioners whose claims are time barred by § 2244(d). See Harris, 209 F.3d at 329-30. Equitable tolling was developed to overcome injustices that may occur under a strict application of a statute of limitations. It is a "discretionary doctrine that turns on the facts and circumstances of a particular case [and] equitable tolling does not lend itself to bright-line rules." Id. at 330. In general, the doctrine of equitable tolling is available only under two circumstances: (1) where a plaintiff is prevented from asserting his claims by egregiously wrongful conduct on the part of the defendant, and (2) where extraordinary circumstances beyond plaintiff's control made filing impossible. Id. However, in applying equitable tolling specifically to § 2244(d), the Fourth Circuit has cautioned that the doctrine "must be reserved for those rare instances where - due to circumstances external to the party's own conduct - it would be unconscionable to enforce the limitation period against a party and gross injustice would result." Id. In this case, petitioner was not prevented from asserting his claims by egregiously wrongful conduct on respondent's part. Respondent did not prevent petitioner from filing his habeas petition at an earlier date. In addition, circumstances beyond petitioner's control did not make filing impossible. Petitioner could have filed a state habeas petition at any time during the year after his conviction became final. Petitioner's claims do not fall into either of the two circumstances under which the doctrine of equitable tolling is available.

III. RECOMMENDATION

For the foregoing reasons, the Court recommends that petitioner's petition for writ of habeas corpus be DISMISSED and respondent's motion to dismiss be GRANTED. Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right." Therefore, it is recommended that the Court decline to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. See Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003).

IV. REVIEW PROCEDURE

By copy of this Report and Recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and recommendations within ten days from the date of mailing of this report to the objecting party, computed pursuant to Rule 6 (a) of the Federal Rules of Civil Procedure, plus three days permitted by Rule 6(e) of said rules. See 28 U.S.C. § 636(b) (1) (C) (2000); FED.R.Civ.P. 72(b). A party may respond to another party's objections within ten days after being served with a copy thereof.

2. A district judge shall make a de novo determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in waiver of right to appeal from a judgment of this court based on such findings and recommendations. See Thomas v. Arn, 474 U.S. 140(1985); Carr v. Hutto, 737 F.2d 433 (4th Cir. 1984); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

UNITED STATES MAGISTRATE JUDGE

Norfolk, Virginia
FEBRUARY

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

THOMAS ROY HENDERSON,
Petitioner,

v.

Case No. 2:05cv639

GENE JOHNSON, etc.,
Respondent.

JUDGMENT IN A CIVIL CASE

[X] Decision by the Court. This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the petition for a writ of habeas corpus is DENIED and DISMISSED pursuant to the statute of limitations, and judgment is entered in favor of the respondent.

DATED: March 30, 2006

ELIZABETH H. PARET, Clerk

BY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

APRIL 3, 2006

THOMAS ROY HENDERSON,
Petitioner,

v. 2:05CV639

GENE JOHNSON, etc.,
Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to petitioner's convictions on October 24, 2002, in the Circuit Court for the City of Portsmouth, Virginia, for possession with the intent to distribute cocaine and possession of a firearm while in possession of a controlled substance, as a result of which he was sentenced to serve ten years in the Virginia penal system.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 29 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. The Magistrate Judge filed his report recommending dismissal of the petition on March 1, 2006. By copy of the report, each party was advised of his right to file written objections to the findings and recommendations

made by the Magistrate Judge. The Court received from petitioner on March 14, 2006, objections to the report.

The Court, having reviewed the record and examined the objections filed by the petitioner and having made de novo findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the Report of the United States Magistrate Judge filed March 1, 2006. It is, therefore, ORDERED that the petition be DENIED and DISMISSED pursuant to the statute of limitations and that judgment be entered in respondent's favor.

To the extent that petitioner objects to the Magistrate Judge's conclusion that his petition is barred by the statute of limitations, his objections are without merit. Petitioner makes much in his objections of the fact that he filed a federal habeas petition in May, 2004, which was subsequently dismissed in June, 2004, for failure to exhaust state court remedies. Petitioner even goes so far as to assert that his first filing in federal court "was by sheer chance within the time-filing period under the AEDPA." (Obj. at 12). Petitioner could not be more in error.

Petitioner's judgment became final on November 24, 2002. Petitioner had one year from that date to file his federal habeas petition. 28 U.S.C. § 2244 (d) (1) (A). However, petitioner filed no appeal in the Virginia Court of Appeals or in the Supreme Court of Virginia, and he did not file his state habeas petition until after he filed his first federal habeas petition. When his state habeas petition was filed in June, 2004, that action did not toll the statute of limitations because on that date, petitioner was eighteen months out of time

within which to file a federal habeas corpus action. On the date the instant petition was filed, October 27, 2005, petitioner was more than three years beyond his conviction in state court and clearly out of time.

Petitioner further seeks to establish a basis upon which to pursue habeas relief by arguing that he is entitled to equitable tolling. Petitioner states:

> that due to his being taken to a receiving unit and held there for virtually the entire time he would have had to file under the AEDPA one-year limitation, combined with the lack of notice on the subject of AEDPA, that these factors amounted to an "egregiously wrongful conduct" on the part of those charged with custody and control over him. That this circumstance that was created removed his ability to file within the correct time under the AEDPA.
>
> (Obj. at 13.)

The Court is unaware of any requirement that authorities specifically inform a petitioner in state custody of his right to file a federal habeas petition and the specific time within which it must be filed. Further, while the Court is aware of the fact that research materials, including law books, must be made available to prisoners, the Court is not of the opinion that the requirement of availability makes each correctional institution responsible for having the most up-to-date books or the most current pocket parts for those books. There are ways in which petitioner could have learned about the statute of limitations for a federal habeas appeal, but the more important question is why he did not pursue a state

appeal. In any event, petitioner's time has clearly run, and there is no conduct on the part of the state that would cause the Court to believe that the Commonwealth of Virginia engaged in conduct which "prevented [petitioner] from asserting his claims by egregiously wrongful conduct." (Report and Recommendation at 7.) Petitioner simply failed to timely pursue relief and may not do so now. Petitioner may appeal from the judgment entered pursuant to this Final Order by filing a written notice of appeal with the Clerk of this Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty days from the date of entry of such judgment. Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right." Therefore, the Court, pursuant to Rule 22 (b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of appealability. See Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003).

The Clerk shall mail a copy of this Final Order to petitioner and to counsel of record for the respondent.

Norfolk, Virginia
MARCH 30, 2006

UNITED STATES DISTRICT JUDGE

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

06-6678

THOMAS ROY HENDERSON,
Petitioner – Appellant,

Versus

GENE JOHNSON, Director, Virginia Department of Corrections,
Respondent – Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Raymond A. Jackson, District Judge. (2:05-cv-00639-RAJ)

Before NIEMEYER, KING, and DUNCAN, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Thomas Roy Henderson, Appellant Pro Se. Deana A. Malek, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36©.

PER CURIAM:

Thomas Roy Henderson seeks to appeal the district court's order accepting the recommendation of the magistrate judge and dismissing as untimely his 28 U.S.C. § 2253(c)(1) (2000) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2000). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2)(2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district courts is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that Henderson has not made the requisite showing. Accordingly, we deny a certificate of appealability because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

January 10, 2007

Re: Thomas Roy Henderson

v.

Gene Johnson. Director, Virginia
Department of Corrections
Application No. 06A673

Dear Mr. Henderson:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-titled case has been presented to The Chief Justice, who on January 10, 2007 extended the time to and including March 18, 2007.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

By

Clayton Higgins
Case Analyst

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

March 21, 2007

Thomas Roy Henderson
#314611
Deerfield Correctional Center
21360 Deerfield Drive
Capron, Virginia

RE: Henderson v. Johnson, Dir. VA DOC
(USAP4 No. 06-668)(06A673)

Dear Mr. Henderson:

Returned are 39 copies of the petition for writ of certiorari in the above-entitled case received on March 19, 2007, which fails to comply with Rules of this Court.

The order(s) of the U.S. District Court (report and recommendation, order adopting magistrate's report and final order) must be included in the appendix. Rule 14.1(i). Each order must be reproduced so that it complies with Rule 33.1.

Kindly correct the petition so that it complies in all respects with the Rules of the Court and return it to this office promptly so that it may be docketed. Unless the petition is received by this Office in corrected form with sixty days of the date of this letter, the petition will not be filed. Rule 14.5.

Three copies of the corrected petition must be served on opposing counsel. Rule 29.3.

When making the required corrections to a petition, no change in the substance of the petition may be made.

You must also submit with your petition a check for $300.00 for the filing fee.

Sincerely,
William K. Suter, Clerk
BY: Clayton R. Higgins, Jr.
(202) 479-3019